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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. 200

PANHANDLE EASTERN PIPELINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS,
ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 200

PANHANDLE EASTERN PIPELINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Panhandle Eastern Pipe Line Company (hereafter sometimes referred to as "Panhandle") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in Cause No. 10,116 on its docket.

This appeal is a companion case to the appeal in *Michi-*

gan-Wisconsin Pipe Line Company v. *Robert S. Calvert et al.*, which will be filed concurrently herewith. Both appeals are from similar judgments entered in the State Court in accordance with a single opinion hereinafter referred to. It is recognized in such opinion that the constitutional question involved in both cases is the same, and that the differences in factual situation between Michigan-Wisconsin and Panhandle are immaterial so far as that question is concerned.

Opinion Below

The trial judge filed no opinion. The opinion of the Court of Civil Appeals is reported at 255 S.W. 2d 535, and a copy is attached hereto as Appendix A.*

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act [1]—is here involved. A copy of Section XXIII it attached hereto as Appendix B,**

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* (Clerk's note. This opinion is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

[1] Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

** (Clerk's note. This statute is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted.

Subsection 2 is as follows (Omitting certain exemptions therein contained that are not here pertinent):

> "In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

> "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

Statement

The Court of Civil Appeals recognized in its opinion that, except for minor variations, Panhandle conducts its activities in the same manner as does Michigan-Wisconsin. Those variations, as stated by that Court, are that Panhandle "loads" its interstate pipeline with gas from the outlets of three gasoline plants rather than with gas from only one plant; that Panhandle produces a portion of the gas which it receives at the outlet of one of such plants; and that Panhandle makes sales in Texas to three small customers rather than sending all of its gas outside the state. 255 S.W. 2d at 539.

Panhandle is a natural gas pipeline company, holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C., §717 *et seq.* Its main pipeline originates near the east boundary of Moore County, Texas, extends thence through portions of the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan. It "takes or retains," within the meaning of Section XXIII of H.B. 285, gas into such pipeline at the outlets of three gasoline plants, namely, the Phillips Sneed gasoline plant, the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant. These points of taking are shown on Appendix A to the opinion of the Court of Civil Appeals. 255 S.W. 2d at 547.

The gas which Panhandle sells to three customers in Texas aggregates only 146.3 m.c.f daily, representing only .36 of 1 per cent of the total volumes of gas received into its pipeline facilities within the State of Texas. Except for those sales, Panhandle sells no gas in Texas from such pipeline, its southernmost point of sale being Kismet, Kansas. The principal markets served by Panhandle include gas distribution companies and industrial consumers in the States of Missouri, Illinois, Indiana, Ohio and Michigan. In the operation of its interstate pipeline system, Panhandle owns and operates 18 compressor stations in various states.

In addition to interstate transportation of gas from Texas, Panhandle also produces gas in Texas. A portion of the gas so produced by Panhandle is delivered into the Sneed gasoline plant of Phillips Petroleum Company.[2] At

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[2] Technically, it might be argued that, at the outlet of the gasoline plant, Panhandle "retains" possession of the residue from gas which it has produced and "takes" possession only of the residue gas which it purchases. However, this is an immaterial matter of verbiage, and, for convenience, all gas which Panhandle receives into its pipelines will be referred to as gas which Panhandle "takes."

that plant Phillips (under a contract between Panhandle and Phillips) extracts liquefiable hydrocarbons (gasoline, etc.) from the raw gas, and then, at the outlet of the gasoline plant, Panhandle receives or "takes" the residue gas into its interstate transportation pipeline along with other residue gas which is purchased by Panhandle from Phillips. At the outlets of the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant, Panhandle "loads its interstate pipeline" with residue gas produced by other producers.

The movement of all the residue gas which Panhandle takes at the outlets of such gasoline plants, from the outlets of the respective plants through Panhandle's pipeline system to its customers in other states, is a steady and continuous flow, and the taking of such gas at the outlets of the gasoline plants is accomplished by Panhandle through facilities owned by it that are used exclusively in connection with such taking, receiving and transportation. When the residue gas enters Panhandle's interstate pipeline at the outlets of the plants, such gas is already committed by contract to sale and delivery to Panhandle for transportation to points in other states (except the small portion thereof which is sold within the State of Texas).

There is no break in the continuous flow of the gas from the points where such gas enters Panhandle's interstate pipeline at the outlets of the gasoline plants to points of delivery to Panhandle's customers in states other than Texas; the purpose of taking the gas at the outlets of the gasoline plants is solely for interstate transportation to markets in states other than in Texas; and the invariable practice of Panhandle necessarily is to transport such gas in interstate commerce. It is perfectly obvious, therefore, that the function exercised by Panhandle as to the gas which it takes at the outlets of the three gasoline plants is the same function as that which is exercised by Michigan-

Wisconsin as to the gas which it takes at the outlet of the Phillips gasoline plant involved in Michigan-Wisconsin's case. The fact that Panhandle loads its interstate pipeline at three points, just as an interstate railroad loads its trains at more than one station, is, of course, not material. The fact that Panhandle engages in production of gas (a local activity) does not impair its right, under the Commerce Clause, to the protection of its interstate transportation activities against the burden of state occupation taxes. *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). Cf. *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938). Nor is Panhandle deprived of the protection of the Commerce Clause as to the gas which it takes for interstate transportation by the circumstance that small quantities of gas are sold from its pipeline in the State of Texas. *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921). The Court of Civil Appeals, therefore, properly recognized that the differences in factual situation between Michigan-Wisconsin and Panhandle are not material, and that the same principles which govern in Michigan-Wisconsin's case also apply to Panhandle insofar as the gas which it takes for immediate transportation to markets outside the state is concerned.

Section XXIII of H.B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials therefore, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Panhandle for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Pan-

handle under protest, pursuant to the provisions of the statutes of Texas,[3] and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That Court entered judgment for Panhandle for the full amount of the taxes paid plus interest as provided by the statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that Court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Panhandle filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the decision and judgment of the Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its motion for rehearing was denied on June 3, 1953. Because the Supreme Court of Texas refused to grant appellant's application for writ of error, the Court of Civil Appeals is the highest Court of the State in which a decision could be had. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of the Supreme Court to review by appeal the decision of the Court of Civil Appeals herein is conferred by Title 28 U.S.C., § 1257(2). The decisions sustaining this Court's jurisdiction on appeal include *United Gas Public Service* v. *Texas*, 301 U.S. 667 (1937); *Lone Star*

[3] Article 7057b, Vernon's Annotated Civil Statutes.

Gas Co. v. *Texas,* 304 U.S. 224 (1938); *Bain Peanut Co.* v. *Pinson,* 282 U.S. 499 (1931); *Adams* v. *Saenger,* 303 U.S. 59, 61 (1938); *Bacon* v. *Texas,* 163 U.S. 207 (1896); *Sullivan* v. *Texas,* 207 U.S. 416 (1907); *San Antonio & Aransas Pass Ry. Co.* v. *Wagner,* 241 U.S. 476 (1916); *St. Louis, Etc., Ry. Co.* v. *Seale,* 229 U.S. 156 (1913); *American Railway Express Co.* v. *Levee,* 263 U.S. 19 (1923).

Manner in Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid."[4] This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185 (1945).

The Question Presented By This Appeal Is Substantial

Of the many suits filed in the State Courts of Travis County, Texas, in which the validity of Section XXIII of H.B. 285 was challenged, three were selected as test cases,—the case filed by Michigan-Wisconsin, the case filed by Pan-

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[4] Appendix A, *infra;* 255 S.W. 2d at 537-8.

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handle and one filed by Amarillo Oil Compnay (herein referred to as Amarillo). Amarillo does no interstate business. Its suit is based on Subsection 11 of the Act which provides, in substance, that if the Act is held invalid as to gas of which possession is taken for interstate transmission, the tax shall not be levied as to gas, possession of which is taken for intrastate consumption.

The three cases were tried together in the District Court and separate judgments were entered for refund of the taxes that had been paid under protest by each plaintiff, it being held that, as applied to the gas taken by Michigan-Wisconsin and Panhandle, respectively, for transportation in interstate commerce, the Act is violative of Article I, Sec. 8, Cl. 3 (the Commerce Clause) of the Constitution of the United States. Separate records were made and separate appeals were taken to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. In that Court, the three cases were treated as companion cases. They were all briefed together, and orally argued together, and, while separate judgments of reversal were entered, the reversals were under one opinion which dealt with all three cases. Thereupon, separate but identical applications for writs of error were made to the Supreme Court of Texas where writ of error was refused in each such case. Thereafter, the Supreme Court of Texas overruled motions for rehearing of the applications filed by Michigan-Wisconsin and by Panhandle, but ruling on motion for rehearing of the application for writ of error filed by Amarillo was withheld by the Supreme Court.[5]

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[5] It is understood that action on the motion for rehearing filed by Amarillo has been withheld because it is recognized by the Court that Amarillo, doing wholly intrastate business, itself has no protection under the Commerce Clause and is entitled to relief only under Subsection 11 of the Act in the event the Act is held invalid as to those who take possession of gas for interstate transportation.

It was recognized by all parties in the preparation of briefs filed in the Court of Civil Appeals and in the briefs relating to the applications for writs of error that the minor variations between the operations of Michigan-Wisconsin and those of Panhandle are not of significance in a determination of the issue presented; and, since the facts relating to Michigan-Wisconsin are more simple than those pertaining to Panhandle (there being only one point of "taking" possession), the particular facts involved in Michigan-Wisconsin's case were used for purposes of illustration in considering whether the tax is imposed for the privilege of engaging in an activity that is a part of interstate commerce. That same policy was followed by the Court of Civil Appeals in its opinion which is applicable to both cases.

Appellant in the companion case, *Michigan-Wisconsin Pipe Line Company* v. *Robert S. Calvert et al.*, has incorporated in the "Statement as to Jurisdiction" presented in connection with its appeal, under the heading "The Question Presented by This Appeal Is Substantial," a full discussion of the importance of the appeal,—the substantiality of the question involved. In the interest of brevity, this appellant adopts, as if repeated here, that portion of the "Statement as to Jurisdiction" presented in connection with the appeal of Michigan-Wisconsin Pipe Line Company. Such discussion is here briefly summarized as follows:

The Act is "furtively directed" at interstate commerce. The legislature applied the term "gathering" in an artificial definition to an activity which is not "gathering" gas, as that term is generally understood, but is nothing more than "receiving possession" just as a railroad, a ship or a truck receives possession of other commodities for transportation. It was made clear, as shown by the legislative history, that the purpose of the Act was to "tax the pipe-

line gas that goes out of Texas and give as much protection as possible to Texas industries."[6] Subsection 4 of the Act makes it impossible for any pipeline to attempt by contract to shift the tax to its vendor. The tax must, at all events, be borne by the pipeline companies, and, eventually, the consumers. Moreover, it is expressly provided in Subsection 11 of the Act that if the tax levied thereby is held invalid, as applied to gas of which possession is taken for interstate transportation, the tax shall not be levied as to gas for intrastate consumption.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government. Every gas pipeline company which operates lines leaving the state is subject to the tax simply because it "takes possession" of the product within the state for the purpose of such transportation. From the State of Texas, gas flows by pipelines to 38 other states. Consumers of gas carried by Panhandle alone reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. Gas transported by Michigan-Wisconsin serves consumers in Missouri, Iowa, Michigan and Wisconsin.[7] The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 433-434 (1947).

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[6] House Journal, June 1, 1951, p. 2979.

[7] Many other pipeline companies (practically all of which are included among the 117 plaintiffs whose rights are dependent on the outcome of these test suits) also transport gas out of the numerous gas fields in Texas—the Panhandle area, the Gulf Coast area, the South Texas area, the Permian Basin—to points of consumption as far west as California, as far to the northwest as Minnesota, and northeasterly to the New England States.

As applied to appellants, the amount of the tax is measured by and related mathematically to the volumes of gas which are transported in interstate commerce, and interstate commerce is burdened in direct proportion to its volume. Moreover, if this tax is upheld, the way will be clear for the imposition of multiple tax burdens upon interstate commerce. If Texas may impose a tax upon pipelines for the "privilege" of "taking or retaining possession" of gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for the "privilege" of "taking or retaining possession" of the same gas within that state, or for any other activity within that state which contributes to the interstate movement of the gas—and so may the other states through which appellant's pipeline runs. This also is a proof of the invalidity of the Act. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 435, 439 (1939).

The state has attempted to "carve out from what is an entire or integral economic process" a particular phase or incident, which it seeks to sustain on the theory that such a phase is "separate and distinct" or "local." That cannot lawfully be done. *Nippert* v. *Richmond,* 327 U.S. 416, 423 (1946); *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 393 (1952). The "loading of a pipeline" for interstate transportation, like the loading of a ship or the loading of a train, is an inseparable, indivisible part of the transportation itself. *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90 (1937); *Joseph* v. *Carter & Weeks Stevedoring Co.,* 330 U.S. 422 (1947); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885).

The case shows the ultimate in continuity of interstate movement. The movement of the gas from the points where it is "loaded" into appellant's interstate pipeline to appellant's markets in the states named is a steady and

continuous flow. There is no storage involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, and through its pipeline to points in other states. Under circumstances of similar continuity of movement and certainty of destination, this Court has "no doubt" that the movement of the gas was in interstate commerce. ***Interstate Natural Gas Co.* v. *Federal Power Commission,*** 331 U.S. 682, 687 (1947).

If Texas may lawfully tax carriers of gas for the "privilege" of "loading their pipelines" for immediate transportation to other states, then the State of Minnesota could lawfully tax the owners of ore boats for the privilege of loading their boats at Duluth for transportation to Gary; West Virginia could impose upon railroads a tax for the privilege of "taking possession" of coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The tax here involved has exactly the same effect, as to gas, as if Texas had erected custom-houses at points on its state line where carriers, railroads, trucks, ships, or pipelines cross into other states, and was requiring such carriers to pay a tax on the commodities carried for the "privilege" of having "taken possession" of such goods (loaded their railroad cars, tanks, ships or pipelines) within the state. The Commerce Clause was designed to end, and in the future prevent, exactly this kind of impost laid upon commercial intercourse between the states. ***Story, The Constitution, Sec.*** 259, 260; ***Case of the State Freight Tax,*** 15 Wall. 273, 276; Cf. ***Freeman* v. *Hewit,*** 329 U.S. 249, 252; ***Hood* v. *DuMond,*** 336 U.S. 525, 533 (1949). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Conclusion

Appellant respectfully suggests that enough has been presented in this Statement of Jurisdiction and in the statement filed on behalf of Michigan-Wisconsin in the companion case to bring before this Court a question under the Commerce Clause that is far reaching and important both as to the principles involved and the impact upon the consumers of gas in the areas served by this appellant; that this Court's appellate jurisdiction has been properly invoked; and that the federal question involved is substantial in merit. The importance of the issue warrants this Court's consideration of the appeal upon full briefs and arguments.

Respectfully submitted,

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